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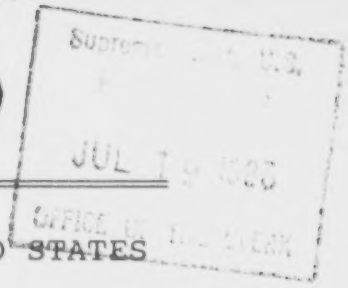

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

GILBERT R. SERRANO
Petitioner

V.

UNITED STATES OF AMERICA
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Ninth Circuit pattern instruction, which defines reasonable doubt in terms of "firmly convinced," dilute the standard of reasonable doubt and conflict with the "hesitate to act" definition approved by the this Court in *Holland v. United States* and required by all other Circuits? Does defining reasonable doubt in terms of "firmly convinced," conflict with this Court's holdings in Cage v. Louisiana and Sullivan v. Louisiana, which condemn using the similar term "substantial doubt?"

2. In a federal prosecution for conspiracy and aiding and abetting credit union fraud, did it violate Due Process to instruct the jury that statutory elements of knowledge, intent and wilfulness, were equal to "recklessness" contrary to cases of this Court and Circuit cases?

B. PARTIES TO THE CASE

Parties below which are not named in this petition are co-defendants Sharon Campbell (Ninth Circuit #92-30024) and Emitt Wilson (Ninth Circuit #92-30037)

C. TABLE OF CONTENTS

QUESTIONS PRESENTED.....i

PARTIES TO THE CASE.....ii

TABLE OF CONTENTS.....iii

TABLE OF AUTHORITIES.....iv

OPINION BELOW 1

JURISDICTIONAL STATEMENT.....1

TEXT OF PROVISIONS RELIED UPON.....2

STATEMENT OF THE CASE.....5

REASONS FOR GRANTING THE WRIT.....10

1. THE NINTH CIRCUIT DEFINITION OF REASONABLE DOUBT AS "FIRMLY CONVINCED" CONFLICTS WITH SUPREME COURT AND CIRCUIT CASES AND DUE PROCESS 10

2. THE INSTRUCTION EQUATING FALSE STATEMENTS TO RECKLESSNESS VIOLATES DUE PROCESS SINCE THE STATUTES REQUIRE KNOWLEDGE, INTENT, OR WILFULNESS.....19

CONCLUSION.....27

APPENDIX A: NINTH CIRCUIT OPINION

APPENDIX B: ORDER DENYING REHEARING AND *EN BANC* REVIEW

TABLE OF AUTHORITIES

CASES

Adams v. Aiken, 965 F.2d 1306 (4th Cir. 1992). 13

Blatt v. U.S., 60 F.2d 481 (3rd Cir. 1932) 12

Cage. v. Louisiana, 489 U.S. 39, 111 S.Ct. 328, 112 L.Ed 2d 339 (1990) 6,11,17

Cheek v. U.S., 498 U.S. 192, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991). . . . 22

Connecticut v. Johnson, 460 U.S. 73, 103 S.Ct. 969,74 L.Ed.2d 823 (1983) 22

Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985 . . . . . 22, 26

Friedman v. U.S., 381 F.2d 155 (8th Cir. 1967) 12

Holland v. U.S., 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed 150 (1954) . . 5, 10, 15

In Re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). . 17, 18

Ingram v. U.S., 360 U.S. 762, 79 S.Ct. 1314, 79 S.Ct. 1314, 3 L.Ed.2d 1503 (1959) 20

Liporata v. U.S., 471 U.S.419, 105 S.Ct. 2084, 62 L.ed.2d 575 (1980) 22

Monk v. Zelez, 901 F.2d 885 (10th Cir. 1990) 12, 13

Morrisette v. U.S., 342 U.S. 246,
72 S.Ct. 240, 96 L.Ed. 288
(1952) 21

Mulaney v. Wilbur, 421 U.S. 684,
95 S.Ct. 1881, 44 L.Ed.2d 508
(1975) 21

Mundy v. U.S., 176 F.2d 32
(D.C. Cir. 1949) 12

Scales v. U.S., 367 U.S. 203,
81 S.Ct.1469, 6 L.Ed.2d 1267
(1961). 20

Smith v. Bordenkicker, 718 F.2d 1273
(4th Cir. 1983). 14

Sullivan v. Louisiana, __ U.S.__ (#
92-5129, 6/1/93, 1993 WL 179275) . . 11

Theron v. U.S. Marshall, 832 F.2d 492
(9th Cir. 1987). 21

U.S. v. Adamson, 700 F.2d 953
(5th Cir. 1983) 20, 23

U.S. v. Alvero, 470 F.2d 981
(5th Cir. 1972). 14

U.S. v. Atkins, 487 F.2d 257
(8th Cir. 1973). 14

U.S. v. Bonallo, 858 F.2d 1427
(9th Cir. 1988). 21

U.S. v. Bowman, 783 F.2d 1192
(5th Cir. 1986) 13

U.S. v. Campbell, 874 F.2d 838
(1st Cir. 1989) 13

U.S. v. Cloud, 872 F.2d 846
(9th Cir. 1989) 20, 21

U.S. v. Ferraro, 414 F.2d 802
(10th Cir. 1969) 20

U.S. v. Ivic, 700 F.2d 51
(2d Cir. 1983). 12

U.S. v. Jamarillo-Suarez, 930 F.2d 1378
(9th Cir. 1991) 12

U.S. v. Jensen, 561 F.2d 1297
(8th Cir. 1977) 12,13

U.S. v. Krasovich, 819 F.2d 253 (9th
Cir.1987) 20

U.S. v. Levy, 741 F.2d 915
(7th Cir. 1984). 20

U.S. v. Mars, 551 F.2d 711
(6th Cir. 1977) 12

U.S. v. McAnally, 666 F.2d 1116
(7th Cir. 1981). 21, 24

U.S. v. Morris, 647 F.2d 568
(5th Cir. 1981) 12

U.S. v. Moss, 756 F.329
(4th Cir. 1985) 12

U.S. v. Nolasco, 926 F.2d 869
(9th Cir. en banc, 1991) 12

U.S. v. Olmstead, 832 F.2d 642
(1st Cir. 1987) 12

U.S. v. Pepe, 501 F.2d 1142
(10th Cir. 1974) 6

U. S. v. Restaino, 369 F.2d 544
(3rd Cir. 1966) 12

U.S. v. Stozek, 783 F.2d 891
(9th Cir. 1986) 20

U.S. v. United States Gypsum,
438 U.S. 422, 98 S.Ct 2864,
57 L.Ed.2d 854 (1978) . . . 22, 23

U.S. v. Wright, 365 F.2d 135
(7th Cir. 1966) 12

U.S. v. Wright, 542 F.2d 975
(7th Cir. 1976) 14

STATUTES

18 U.S.C. Section 2 . . . . . 1, 2, 7

18 U.S.C. Section 371 . . . 1, 2, 3, 18

18 U.S.C. 656 . . . . . 7, 22, 23

18 U.S.C. Section 657 . . . . . 1, 3, 18

18 U.S.C. Section 1014 . . . . . 1, 4, 7

18 U.S.C. 1344 . . . . . 1, 4, 7

8 U.S.C. Section 1006 . . . . . .1, 3, 7

OPINIONS BELOW

Gilbert Serrano seeks review of *U.S. v. Serrano*. (Ninth Circuit, unpublished opinion #92-30033, 12/7/92, amended 1/27/93) There were no written decisions in the United States District Court.

JURISDICTIONAL STATEMENT

Petitioner Serrano was convicted in the United States District Court for conspiracy and aiding false statements to obtain Credit Union Funds, in violation of 18 U.S.C. §§ 2, 371, 657, 1006, 1014, and 3344. A timely appeal was denied by the Ninth Circuit in an opinion dated December 7, 1992. A timely petition for rehearing, and *en banc* review were denied on April 27, 1993. This petition is timely filed within 90 days under Supreme Court Rule 13.1 and 13.4 and jurisdiction is invoked under 28 U.S.C. § 1254(1).

TEXT OF AUTHORITIES

The 5th Amendment states in pertinent part:

> ...No person...shall be deprived of life, liberty, or the pursuit of happiness without due process of law.

18 U.S.C. Section 2 states in part:

> Aiding and Abetting: A) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces, or procures its commission is punishable as a principal. B) Whoever wilfully causes an act to be done which if directly performed by him or another would be an offense against the United States is punishable as a principal.

18 U.S.C. Section 371 states in part:

> Conspiracy: If two or more persons conspire either to commit any offense against the United States or to defraud the United States or any agency thereof in any manner or for any purpose and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned for not more then five years or both.

18 U.S.C. Section 657 reads in parts:

> ... Whoever being an officer of ...any institution, the accounts of which are insured by the ... National Credit Union Administration ... willfully misapplies monies, funds, ... belonging to such institution ...shall be fined not more than $5,000 or imprisoned not more than five years or both...

8 U.S.C. Section 1006 reads in part;

> ... Whoever being an officer of ... any institution the accounts of which are insured by the National Credit Union Administration ... with intent to defraud any such institution ...or to deceive any officer auditor examiner or agent of any such institutions ....makes any false entry in any book report or statement of or to any such institution or without being duly authorized draws any order or bill with intent to defraud ... participates or shares in or receives directly or indirectly any money profit, property, or benefits, through any ...loan, ...shall be fined not more than $10,000 or imprisoned not more tan five years or both.

18 U.S.C. Section 1014 states in part:

> Loan and Credit Applications Generally...Whoever knowingly makes any false statement or report or willfully overvalues land, ...for the purpose of influencing in any way ... a Federal Credit Union ....upon any application, advance, discount, purchase agreement, repurchase agreement, commitment or loan ... shall be fined no more than $5,000 or imprisoned not more than two years or both.

18 U.S.C. 1344 states in pertinent part;

> Bank Fraud. Whoever knowingly executes or attempts to execute a scheme or artifice -1) to defraud a financial institution or; 2) to obtain any of the moneys, funds ... owned by the financial institution by means of a false or fraudulent pretenses, representations or promises shall be fined by not more than $1,000,000 or imprisoned not more than 30 years or both.

STATEMENT OF THE CASE

Petitioner, Gilbert Serrano, was convicted for 13 counts of conspiracy and aiding false statements to obtain credit union loans./[1] The court gave jury the Ninth Circuit pattern instruction, defining reasonable doubt in terms of "firmly convinced." The entire Ninth Circuit pattern instruction reads:

> Proof beyond a reasonable doubt is proof that leaves you firmly convinced a defendant is guilty.

Petitioner Serrano objected and requested the definition approved in *Holland v. U.S.*, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed.150 (1954), which defined a reasonable doubt as one that would make jurors "hesitate to act in important affairs." This request was denied.

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[1] Petitioner Serrano was convicted in the U.S. District Court in Anchorage, for conspiracy and aiding false statements to obtain Credit Union Funds in violation of 18 U.S.C. §§ 2, 371, 657, 1006, 1014, and 3344.

The Ninth Circuit upheld the use of the above "firmly convinced" instruction, since it is now the accepted pattern of the Ninth Circuit. The Ninth Circuit ignored arguments that the pattern instruction was contrary to the definition of reasonable doubt approved in *Holland, supra* and now required in virtually every other Circuit.

The Ninth Circuit also ignored arguments that in *Cage v. Louisiana*, 489 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990), this Court condemned an almost identical definition of reasonable doubt in terms of a "substantial doubt."

The Ninth Circuit also affirmed a jury instruction given over objection, that statements were fraudulent or false if made "recklessly," even though all charges required proof of knowledge, intent or willfulness. The opinion ignored cases from other Circuits and this Court which hold that knowledge, intent and willfulness can

not be equated to recklessness.

A petition for rehearing and *en banc* review was filed, re-emphasizing the point that the above jury instructions conflicted with Supreme Court and Circuit Court law, but this was denied by the Ninth Circuit.

The reasonable doubt and recklessness instructions were critical, since there was no evidence Petitioner Serrano knew of or intended co-defendant Wilson's misconduct. Evidence showed that Petitioner Serrano formed a land business with Wilson, who managed a Credit Union. Petitioner Serrano, as a real estate agent, found land. Wilson as the banker, acted alone to obtain funds to buy real estate.

In Counts 2 through 4, 9, and 12 through 16, Petitioner Serrano was convicted for aiding Wilson to obtain funds from the Credit Union. Wilson, as a Credit Union officer, was permitted to obtain loans. The government's theory was that he

did not follow Credit Union guidelines.

The loans, however were always obtained solely by Wilson. Petitioner Serrano did not help Wilson get loans, filed no applications, made no assertions, and had no idea of what Wilson asserted to get loans. Petitioner Serrano was not a Credit Union officer and had no knowledge of the guidelines allegedly violated.

Co-defendant Wilson could lawfully borrow money with Credit Union approval and had never been denied loans. There was thus no reason for Petitioner Serrano to even suspect Wilson and no evidence he knew of any misconduct. The evidence only showed Petitioner Serrano deposited loan funds obtained by Wilson into a joint account and used the funds to buy real estate./[2]

Petitioner Serrano was also convicted

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[2] Petitioner Serrano co-signed one loan for which he was acquitted in count 10, but no evidence showed that he had any reason to suspect any misconduct by Wilson in obtaining this loan either.

in counts 5 through 7 for over-valuing land in 3 written estimates. Experts disagreed as to whether Petitioner Serrano's estimates over-valued land, but it was undisputed that his estimates were based on four contemporaneous sales of similar lots, sold at values equal to his estimates.

The improper instruction, which defined reasonable doubt in one short sentence in terms of "firmly convinced," permitted jurors to convict based on a diluted reasonable doubt standard, even if they only concluded it more likely than not that Petitioner Serrano was guilty. The instruction on "recklessness" permitted conviction without any finding of knowledge if jurors thought Petitioner Serrano was reckless in trusting Wilson. /[3]

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[3] Petitioner Serrano attacked sufficiency of evidence in the Ninth Circuit. While sufficiency is not raised in this petition it is noted to show how the diluted standards of reasonable doubt and recklessness led to conviction.

REASONS FOR GRANTING THE WRIT

1. THE NINTH CIRCUIT DEFINITION OF REASONABLE DOUBT CONFLICTS WITH THE *HOLLAND* DEFINITION REQUIRED BY THIS COURT AND OTHER CIRCUITS.

The Ninth Circuit pattern definition of reasonable doubt, in terms of "firmly convinced," dilutes reasonable doubt, contrary to decisions of this Court and contrary to nine other Circuits.

In *Holland v. U.S.*, *supra*, this Court approved defining reasonable doubt as "the kind of doubt that would make a person hesitate to act in important matters" and ruled that *if* a definition is given, it should include this language. *Holland, supra,* 348 U.S. at 140./[4]

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[4] The *Holland* instruction is found in Devitt and Blackmar, *Federal Jury Practice and Instructions*, 3rd Ed.§11.14 (1977), and provides:

A reasonable doubt is a doubt based on reason and common sense - the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must therefore be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his own affairs. The jury will remember that a defendant is never to be convicted on mere suspicion or conjecture.

In *Cage v. Louisiana, supra* this Court held Due Process was violated where instead of the *Holland* instruction, reasonable doubt was defined as a "substantial doubt." The Supreme Court prohibited dilution of the reasonable doubt standard, holding;

> It is plain to us that the words "substantial" and "grave" as commonly understood suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard.

Id at 489 U.S. 39-40.

Recently, in *Sullivan v. Louisiana*, __ U.S.__ (# 92-5129, 6/1/93, 1993) this Court reaffirmed *Cage*, and held the term "substantial doubt" was so offensive to Due Process, that it could not be harmless. *Id.* at page 3.

The term "firmly convinced" used in Petitioner Serrano's case, could easily be perceived by jurors to be similar to the term "substantial doubt" condemned in *Cage*, and found *per se* reversible in *Sullivan*.

The Ninth Circuit pattern also conflicts with almost every Circuit, including the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eight, and Tenth Circuits which all require the *Holland* instruction if a definition is given./[5] Four circuits mandate the *Holland* instruction in all cases./[6] No circuit permits the "firmly convinced" standard./[7]

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[5] Cases requiring *Holland* are; U.S. v. Olmstead, 832 F.2d 642, 644 (1st Cir. 1987) *cert. denied* 486 U.S. 1009, 108 S.Ct 1739, 100 L.Ed.2d 202 (1988); *U.S. v. Ivic*, 700 F.2d 51 (2d Cir. 1983); *U. S. v. Restaino*, 369 F.2d 544 (3rd Cir. 1966); *U.S. v. Moss*, 756 F.329 ,334 n.1 (4th Cir. 1985); *U.S. v. Morris*, 647 F.2d 568, 571 (5th Cir. 1981); *U.S. v. Mars*, 551 F.2d 711 (6th Cir.1977); *U.S. v. Wright*, 365 F.2d 135 (7th Cir. 1966); *U.S. v. Jensen*, 561 F.2d 1297,1301 (8th Cir. 1977); *Monk v. Zelez*, 901 F.2d 885 (10th Cir.1990).

[6] *Blatt v. U.S.*, 60 F.2d 481 (3rd Cir. 1932); *Friedman v. U.S.*, 381 F.2d 155(8th Cir. 1967); *U.S. v. Pepe*, 501 F.2d 1142,1143 (10th Cir. 1974); *Mundy v. U.S.*, 176 F.2d 32 (D.C. Cir. 1949).

[7] The Ninth Circuit has squarely adopted its own pattern instruction. In *U.S. v. Nolasco*, 926 F.2d 869 (9th Cir. en banc, 1991) cert. denied ___U.S.__, 112 S.Ct. 111, 116 L.Ed.2d 80 an *en banc* panel held the *Holland* definition need not be given. Petitioner Serrano's opinion relied on the published decision of *U.S. v. Jamarillo-Suarez*, 930 F.2d 1378,1386 (9th Cir.1991) to conclude the Ninth Circuit pattern definition may be given as a substitute for the *Holland* instruction.

Most Circuits have struck down standards similar to "firmly convinced." In *U.S. v. Jensen*, 561 F.2d 1297 (8th Cir. 1977) the court held that the term "abiding conviction" diluted reasonable doubt to a preponderance standard and thus conflicted with *Holland, supra;*

> The instruction is confusing because it makes reasonable doubt contingent upon whether one is "satisfied of the defendant's guilt" and whether one has "an abiding conviction of guilt." *Use of these phrases approaches a reasonable man criterion rather than the strict standard envisioned as "beyond a reasonable doubt."*

Id. at 1301. (emphasis added)

In *U.S. v. Campbell*, 874 F.2d 838 (1st Cir. 1989) the first circuit found that defining reasonable doubt in terms of a "fair doubt" was improper. In *Monk v. Zelez*, 901 F.2d 885 at 889 (10th Cir. 1990) the 10th Circuit found it error to equate reasonable doubt with "substantial doubt."

In *Adams v. Aiken*, 965 F.2d 1306, 1311

(4th Cir. 1992) *cert. filed* (#92-6259 10/14/92), the Fourth Circuit found the terms "serious, strong or well founded" improperly diluted reasonable doubt. In *Smith v. Bordenkicker*, 718 F.2d 1273, 1276 (4th Cir.1983) cert. denied 466 U.S. 976, 104 S. Ct. 2355, 80 L.Ed.2d 828 (1984), the Fourth Circuit prohibited defining reasonable doubt as "substantial or real doubt."

In *U.S. v. Atkins,* 487 F.2d 257,260 (8th Cir. 1973) and *U.S. v. Wright,* 542 F.2d 975,988 (7th Cir. 1976), cert denied, 429 U.S. 1073, 97 S.Ct.810, 50 L.Ed 2d 790 (1977), the Seventh Circuit and Eighth Circuit condemned defining reasonable doubt as a "substantial doubt." In *U.S. v. Alvero,* 470 F.2d 981,983 (5th Cir. 1972) the Fifth Circuit found the language ..."very substantial doubt" to be improper.

The Ninth Circuit Pattern differs from the "hesitate to act" standard approved by

Holland and required in all other Circuits. The pattern definition given includes only a single short sentence stating that a reasonable doubt is one that leaves jurors .."firmly convinced of a guilt." There is no other supporting definition in the Ninth Circuit pattern and none was given.

Unlike the *Holland* instruction, this pithy "firmly convinced" definition does not elevate reasonable doubt to the level of "important decisions" nor define reasonable doubt in terms of "hesitation." In *Holland, supra,* this Court noted that even defining reasonable doubt in terms of "important decisions" is insufficient since:

> ... choosing a spouse, or buying a house may involve uncertainty and risk unlike decisions jurors ought to make in criminal cases.

Holland, supra, 348 U.S. at 140.

For example, one might be "firmly convinced" to vote for a presidential candidate despite great hesitations as to

all. One might be firmly convinced to buy a Chevy instead of a Ford, but still have substantial doubts as to both. One may be firmly convinced a defendant is guilty by the preponderance of the evidence despite significant hesitations as to his guilt.

It is not obvious to those untrained in law that reasonable doubt is a higher standard than a preponderance. In *U.S. v. Nolasco, en banc, supra*, Judge Wiggins compellingly explained the need to clearly define reasonable doubt:

> ..."reasonable doubt" conveys an important concept. It is not a common phrase used by lay people and does not have a self-evident meaning. True, each word occurs regularly in common speech. However, placed together without explanation, the words do not necessarily convey the high standard of proof the due process clause requires... It is not immediately obvious to those untrained in law that reasonable doubt means a higher level of proof than a preponderance.

Id. at 879 (dissent of Judge Wiggins.)

One study shows most jurors did *not*

understand the high level of reasonable doubt. David Strawn & Raymond Buchanan, *Jury Confusion: A Threat to Justice*, 59 Judicature 478, 481-82 (May 1976).

Reasonable doubt is a cornerstone of American criminal trials. The importance of reasonable doubt was emphasized by this Court in *Cage v. Louisiana, supra;*

> The reasonable doubt standard plays a vital role in the American scheme of criminal procedure. *In Re Winship* 397 U.S. at 363. Among other things it is a prime instrument for reducing risk of convictions resting on factual error.

Id. 498 U.S. 40, 111 S.Ct 329

In Re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), also held reasonable doubt vital to Due Process;

> The accused during a criminal prosecution has at stake interests of immense importance both because of the possibility that he may lose his liberty ... to this end the reasonable doubt standard is indispensable for it impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.

Id. 397 U.S. at 364.

It is difficult to fathom a requirement that is more basic to the fundamental fairness of a criminal trial than the definition of reasonable doubt. Nothing is more offensive to Due Process than the image of juries mistakenly applying a diluted standard of reasonable doubt, based on a vague or misleading instruction. Nor should the cornerstone of a criminal trial vary from Circuit to Circuit or vary from Judge to Judge.

It is respectfully urged that this Court should grant review to insure that citizens are not improperly convicted based on a diluted standard of reasonable doubt, and to insure uniformity in the Circuits.

At minimum, this court should summarily reverse the Ninth Circuit's use of a pattern instruction that so violently conflicts with the mandates of *Holland, Cage, and Sullivan, supra*.

2. THE JURY INSTRUCTION EQUATING FRAUDULENT STATEMENTS WITH MERE RECKLESSNESS VIOLATED DUE PROCESS

The court violated Due Process by instructing the jury over objection, that statements were false or fraudulent if they were "reckless." The court instructed:

> A statement or representation is "false" or "fraudulent" if it relates to a material fact and is known to be untrue or is made with reckless indifference as to its truth or falsity and is made or caused to be made with intent to defraud.

(Instruction #46 Er.154.)

The above instruction was read to the jury after defining the statutory elements and was not limited to any statute. The definition of "recklessness" thus applied to all statutory charges.

The Ninth Circuit opinion concludes that the government need only prove recklessness to support convictions for conspiracy, aiding and abetting and credit union fraud. This is at odds with cases of this Court and other Circuits.

Petitioner Serrano was charged in all counts with conspiracy or aiding and abetting, under 18 U.S.C. §§ 2 and 371. Both the conspiracy and aiding and abetting statutes require proof of knowledge and intent to bring about an unlawful act. *Ingram v. U.S.*, 360 U.S. 762, 79 S.Ct. 1314, 79 S.Ct. 1314, 3 L.Ed.2d 1503(1959); *Scales v. U.S.*, 367 U.S. 203, 81 S.Ct.1469, 6 L.Ed.2d 1267 (1961).

Federal statutes also require proof of knowledge, intent or willfulness to convict for the underlying charges that Petitioner Serrano was alleged to have aided or conspired to have comitted. Counts 3, 4 and 13 charged aiding violations of 18 U.S.C. § 657 which requires wilful and knowing misapplication./[8]

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[8] *U.S. v. Stozek*, 783 F.2d 891 (9th Cir. 1986) *cert. denied* 479 U.S. 888, 107 S.Ct. 284, 93 L.Ed.2d 259 (1986); *U.S. v. Levy*, 741 F.2d 915 (7th Cir. 1984), *cert. denied* 469 U.S. 1021, 105 S.Ct 440, 83 L.Ed.2d 366 (1984); *U.S. v. Adamson*, 700 F.2d 953, 956-65 (5th Cir. 1983) *cert. denied* 464 U.S. 833, 104 S.Ct. 116, 78 L.Ed.2d 116 (1983); *U.S. v. Ferraro*, 414 F.2d 802 (10th Cir. 1969).

Counts 2, 12 and 16 charged aiding violations of § 1006 which requires knowledge./[9] Counts 5, 6, 7 and 15 charged aiding violations of § 1014, which requires proof of wilful and knowing over-valuation./[10] Counts 9 and 10 charged aiding violations of § 3344 which requires proof of a "knowing" scheme./[11] By contrast the jury instruction permitted the jury to find fraud based on recklessness.

This Court has condemned instructions that improperly dilute the government's burden to prove the statutory mental state. *Mulaney v. Wilbur,* 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); *Morrisette v.*

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[9] *U.S. v. McAnally,* 666 F.2d 1116 (7th Cir. 1981).

[10] *Theron v. U.S. Marshall,* 832 F.2d 492 (9th Cir. 1987) *cert. denied* 486 U.S. 1059, 108 S.Ct. 2830, 100 L.Ed.2d 930 (1988); *U.S. v. Bowman,* 783 F.2d 1192 (5th Cir.1986) (government must prove knowledge, not a reasoned expectation.)

[11] *U.S. v. Bonallo,* 858 F.2d 1427, 1433 (9th Cir. 1988); *U.S. v. Cloud,* 872 F.2d 846 (9th Cir. 1989) *cert. denied* 493 U.S. 1002, 110 S.Ct. 561, 107 L.Ed.2d 556 (1989).

U.S., 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952); *Francis v. Franklin,* 471 U.S. 307, 105 S. Ct. 1965, 85 L.Ed.2d 344 (1985); *Connecticut v. Johnson*, 460 U.S. 73, 103 S.Ct. 969, 74 L.Ed.2d 823 (1983).

Where an instruction dilutes the burden of proof on contested statutory elements, the error can not be harmless. *Francis v. Franklin, supra.*

This Court has consistently held that "recklessness" does not satisfy a statutory requirement of knowledge, intent or willfulness. *Cheek v. U.S.*, 498 U.S. 192, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991), *Liporata v. U.S.*, 471 U.S. 419, 105 S.Ct. 2084, 62 L.Ed.2d 575 (1980); *U.S. v. United States Gypsum*, 438 U.S. 422, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978).

In *Liporata, supra*, this Court noted that a statutory requirement of "knowledge" required proof of awareness and that knowledge was distinct from the lesser

mental state of recklessness. *Id.* at n.5

In *United States Gypsum, supra,* this court held that where business crimes require a finding of knowledge, a finding of recklessness will not suffice:

> In dealing with the kinds of business decisions upon which the anti-trust laws focus, the concept of recklessness and negligence have no place ... we conclude that action undertaken with knowledge of its probable consequences ... can be a sufficient predicate under the antitrust laws.

U.S. v. Gypsum, supra, 98 S.Ct. at 2877

In *Cheek v. U.S., supra,* this Court held that the statutory element of "willfulness" required showing that a defendant had subjective knowledge and that wilfulness could not be equated with mere recklessness.

In *U.S. v. Adamson*, 700 F. 2d 953 (5th Cir. *en banc*, 1983) the Fifth Circuit held that an instruction permitting conviction for bank fraud under 18 U.S.C. 656 based on "reckless disregard," instead of knowledge,

violated Due Process and required reversal;

> ... we conclude the appropriate *mens rea* standard for § 656 is knowledge. In order to convict a defendant for willfully misapplying funds with intent to injure or defraud a bank the government must prove that the defendant knowingly participated in a deceptive or fraudulent transaction. The trier of fact may infer the required intent i.e. knowledge from the defendant's reckless disregard of the interest of the bank; however jury instructions should not equate recklessness with intent to injure or defraud.

Id. at 964

In *U.S. v. McAnally,* 666 F.2d 1116 (7th Cir.1981) the 7th Circuit reversed where false statements under § 1005, were equated with "recklessness" ruling:

> The term reckless covers a broad range of meanings to lawyers and probably an even broader one to laymen. In law it is sometimes used inter-changeably with gross negligence ... in the absence of a clarifying instruction the jury might have so understood it here ... If the [statute] could be satisfied by showing the inaccuracy was the result of gross negligence, then section 1005 would make gross negligence by bank employees in making

> entries on the books a felony... There must be at least a hundred thousand bank officers [who]... make in the aggregate, millions of entries every day; no doubt many are inaccurate and many due to negligence, some gross. We do not think congress meant to expose all bank employees to felony prosecutions.

Id. at 1119

In Petitioner Serrano's case, the instruction that equated fraud with "recklessness" was the only basis possible for conviction. Petitioner Serrano was not a banker and there was no evidence he applied for loans or knew Wilson would not follow guidelines. Since Wilson was lawfully permitted to borrow money from the Credit Union, with approval, there was no reason to suspect Wilson would not follow guidelines. Given the lack of evidence of knowledge or intent, the jury could only have convicted Petitioner Serrano by finding him "reckless" for trusting Wilson to obtain loans or reckless in depending on similar appraisals to estimate land values.

While other language in the instructions required knowledge or intent for conspiracy or aiding and abetting, it is not possible to know which of the contradictory instructions was followed.

In *Francis v. Franklin, supra*, a correct instruction did not cure an improper contradictory instruction, since;

> ... Language which merely contradicts and ... does not explain constitutionally infirm instructions will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict.

Francis v. Franklin, 105 S.Ct at 1975.

It is for Congress to define the statutory elements of conspiracy, aiding and abetting and credit union fraud. This court should grant review to insure that the Ninth Circuit does not make a habit of replacing statutory elements of knowledge, intent or willfulness with its own lesser notion of "recklessness."

CONCLUSION

The Ninth Circuit's pattern definition of reasonable doubt in terms of "firmly convinced," creates a diluted standard, contrary to the definition required by *Holland,* and contrary to *Cage and Sullivan* which condemn the virtually identical term "substantial doubt." The firmly convinced standard also conflicts with all other Circuits, which require the "hesitate to act" definition of *Holland*.

The instruction equating fraudulent statements with "recklessness" diluted the burden to prove the statutory elements of knowledge, intent or wilfulness as required for conspiracy, aiding and abetting, or credit union fraud. Review is urged, in order to insure the Ninth Circuit does not replace these statutory elements with its own lesser standard of recklessness.

This Court should grant this writ, in order to insure that innocent citizens are

not improperly convicted based on a diluted standards of reasonable doubt and to insure uniformity in the Circuits.

At minimum, this court should grant the writ and summarily reverse the Ninth Circuit's use of a pattern instruction that so violently conflicts with the mandates of *Holland, Cage, and Sullivan, supra*.

Respectfully submitted this 18th day of July, 1993.

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APPENDIX A
OPINION OF THE NINTH CIRCUIT

NOT FOR PUBLICATION
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SHARYN G. CAMPBELL, Defendant-Appellant.	No. 92-30024 D.C. #CR-91-34-3-RWL
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. GILBERT R. SERRANO, Defendant-Appellant.	No. 92-30033 D.C.# CR-91-034-RWL
UNITED STATES OF AMERICA Plaintiff-Appellee, v. EMMITT L. WILSON, Defendant-Appellant	No. 92-30037 D.C. # CR-91-34-1-RSWL MEMORANDUM */[1]

[1] * This disposition is not suitable for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir.R. 36-3.

[DATE STAMPED FILED JAN 27 1993]

Appeals from the United States District Court for the District of Alaska
Ronald Lew, District Judge, Presiding. /**[2]

Argued and Submited December 7, 1992
Seattle, Washington

Before WALLACE, EUGENE A. WRIGHT, and LEAVY, Circuit Judges.

The president of a federal credit union, his business partner, and the credit union's legal counsel were convicted by a jury on charges of credit union fraud. On appeal the defendants argue, inter alia, that the district court abused its discretion in making several evidentiary rulings, the evidence was insufficient to support the convictions, the jury was improperly instructed, and the sentences imposed were unlawful. We affirm the convictions but remand for resentencing as

---

[2] ** The Honorable Ronald S.W. Lew, District Judge for the Central District of California, sitting by designation.

to all appellants.

I. MOTION FOR SUBSTITUTION OF COUNSEL

Campbell first argues that the district court abused its discretion by denying her motion for substitution of retained counsel for appointed counsel. Campbell did not move to substitute counsel until the second week of trial; the district court promptly conducted an ex parte hearing on her request and concluded, after listening to both Campbell and her appointed counsel and having observed them for more than a week at trial, that regardless whether a "personality conflict" existed between them, there was no breakdown in communication. Campbell's appointed counsel was adequately prepared for trial--a point conceded by Campbell herself--while retained counsel was not as well prepared to represent her; and, despite denying the motion, the court

offered to let Campbell proceed with retained counsel assisting as adjunct counsel. The district court did not abuse its discretion in denying the motion. See United States v. Castro, 972 F.2d 1107, 1109 (9th Cir.1992).

II. EVIDENTIARY RULINGS

A. Admission of Evidence of Campbell's Fees

Campbell next argues that the district court erred by allowing the prosecutor to impeach Kirschbaum on redirect examination by reading, over Campbell's objection, a portion of his grand jury testimony in which Kirschbaum said that "She always raped me with the fees." Campbell insists that the evidence was irrelevant and unfairly prejudicial, and the prosecutor's use of the comment improperly put her character at issue. We disagree.

The essence of the government's case against Campbell was that she had defrauded the credit union by engaging in a form of

"loan sharking," i.e., Campbell obtained, virtually without terms and without putting up any collateral of her own, letters of credit that enabled her to borrow money from banks and then relend those funds to Fielder and Kirschbaum at a substantial profit. In support of its theory the government introduced, without objection from Campbell, evidence showing the contrast between the lack of terms in Campbell's letters of credit and the notes she drew up for Fielder and Kirschbaum, as well as testimony from Kirschbaum and others about the fees Campbell charged them.

It was Campbell herself who first raised the question about the reasonableness of her fees when she asked Kirschbaum on cross-examination why he and Fielder had been willing to pay her such large sums. Kirschbaum responded that "[T]o me it was a fair transaction." On

redirect the government asked Kirschbaum if he really believed the fees Campbell charged him and Fielder were reasonable. It was only when Kirschbaum insisted that they were fair and that he did not feel that she had "gouged" him that the prosecution impeached Kirschbaum by introducing his prior inconsistent grand jury testimony. The district court did not err by refusing to grant a mistrial based on the introduction of this impeaching evidence.

B. Cross-Examination of Siegel

Serrano and Wilson argue that the district court abused its discretion by restricting the scope of their cross-examination of Siegel regarding his motives for entering into a plea agreement with the government and testifying against them. Our review of the record shows that the district court did not preclude them from asking questions about Siegel's motive for entering into the plea agreement; it

merely ruled that Siegel's subjective belief that he had or had not committed a crime was irrelevant. None of the cases cited by the appellants support what appears to be their argument here, viz., that any limitation of cross-examination constitutes a per se violation of a defendant's right to confront his accuser, and our research failed to disclose any such authority. The district court did not err in ruling as it did.

C. Admission of Serrano's Unredacted Statements

Citing Bruton v. United States, 391 U.S. 123 (1968), Wilson argues that his sixth amendment right to confront his accuser was also violated when Special Agent Scott testified about parts of three interviews he (Scott) had with Serrano that implicated Wilson. With respect to the first statement, Scott's testimony neither mentions Wilson by name nor directly implicates him in any wrongdoing, and in

any event involves criminal activity with which only Serrano, not Wilson, was charged. Accordingly, it does not violate Bruton. See Richardson v. Marsh, 481 U.S. 200, 208 (1987); United States v. Sherlock, 962 F.2d 1349, 1361 (9th Cir.) (as amended) ("[T]he rule is limited to facially incriminating confessions"), cert. denied, 113 S.Ct. 419 (1992). The same is true of Scott's second statement which, though mentioning Wilson by name, clearly implicates only Serrano.

The third statement, however, has Scott quoting Serrano as saying that "Wilson ... called the shots" because "Wilson had the gold." Although this statement arguably implicates only Serrano, since it came in response to the question of how Serrano viewed his relationship with Wilson, the jury could have interpreted it as also implicating Wilson. Nevertheless, this technical violation of Bruton was

harmless beyond a reasonable doubt because of the other overwhelming evidence concerning Wilson's improper loan activities on behalf of Wilco. See United States v. Sutton, 794 F.2d 1415, 1428 (9th Cir.1986).

D. Admission of Credit Union Procedures and Legal Opinions

The appellants argue that the district court erred by admitting into evidence various NCUA regulations, credit union guidelines, and legal opinions that certain loans violated these regulations and guidelines. More specifically, the appellants contend that the government improperly introduced this evidence, not as background information, but as support for its contention that the appellants' violations thereof constituted criminal misconduct, then improperly buttressed this with opinion testimony tending to show that these violations were knowing and intentional.

It appears from the record, however, that the government introduced NCUA regulations and opinion testimony thereon largely in response to the appellants' claims that their actions did not violate any governing regulations or institutional policies, and the court was careful to issue limiting instructions to the jury that such civil violations could not be viewed as evidence of anything other than intent. See United States v. Wolf, 820 F.2d 1499, 1505 (9th Cir.1987), cert. denied, 485 U.S. 960 (1988); accord United States v. Smith, 891 F.2d 703, 710 (9th Cir.1989), amended, 906 F.2d 385 (9th Cir.), cert. denied, 111 S.Ct. 47 (1990); cf. United States v. Musacchio, 968 F.2d 782, 789 (9th Cir.1992) (as amended). Thus, the prosecution's use of credit union policies and procedures to show intent did not run afoul of Fed.R.Evid. 704. See United States v. Castro, 887 F.2d 988, 1000

(9th Cir.1989). Accordingly, the district court's evidentiary rulings in this area were not improper.

III. SUFFICIENCY OF THE EVIDENCE

All three appellants challenge the sufficiency of the evidence to support their convictions. Turning first to Serrano and Wilson, our review of the evidence in a light most favorable to the government leads to the conclusion that any rational trier of fact could have found the essential elements of the crimes charged beyond a reasonable doubt. See United States v. Wales, 977 F.2d 1323, 1325 (9th Cir.1992) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)). Although the question is somewhat closer with respect to Campbell's case, particularly concerning her argument regarding the impropriety of the $1 million loan commitment, we nevertheless reach the same conclusion.

IV. CLOSURE OF COURTROOM DURING READING OF JURY INSTRUCTIONS

Prior to reading the jury instructions, the trial judge made the following announcement: "For those of you who are in the audience, if you wish to remain, you may remain, but no one should be entering or leaving the courtroom during the jury instructions." The appellants now argue that this order violated their Sixth Amendment rights and warrants reversal of their convictions.

The trial court's order in the instant appeal was neither a total closure nor even a partial closure of the proceedings; it constituted at most a temporary exclusion of those who were not even present to begin with. Although the judge failed to state his reasons for the exclusion on the record, the scope of the exclusion was extremely narrow and the appellants were given the opportunity to be heard. They voiced no objection, and neither did anyone else in the courtroom. Whatever educative

value might have been lost by temporarily excluding some member of the audience from watching the reading of the jury instructions was compensated by having a transcript of that reading immediately made available as part of the public record. Accordingly, we conclude that the trial judge's temporary exclusion order does not rise to the level of a constitutional deprivation. See United States v. Sherlock, 962 F.2d at 1356-59.

V. JURY INSTRUCTIONS

A. Reasonable Doubt

The appellants argue that the jury instruction given on reasonable doubt was improper because, inter alia, it ran afoul of Holland v. United States, 348 U.S. 121, 140 (1954). The short answer to this argument is that the trial court gave the standard Ninth Circuit Model Jury Instruction. See e.g. United States v. Jaramillo-Suarez, 950 F.2d 1378, 1385-86 &

nn. 9-11 (9th Cir.1991) (as amended) (distinguishing former Instruction 3.04 from current Instruction 3.03).

B. Recklessness as an Element of Fraud

The appellants also argue that the district court erred by including, as part of its instruction on making a false or fraudulent statement, language equating "reckless indifference" to a statement's truth or falsity with "known to be untrue". We have repeatedly upheld fraud convictions based on a showing of a reckless indifference to the truth. See, e.g., United States v. Gay, 967 F.2d 322, 326 (9th Cir.) (mail fraud), cert. denied, 113 S.Ct. 359 (1992); United States v. Castro, 887 F.2d at 994 (reckless disregard of bank's interests constituted showing of intent to defraud). There was no error.

VI. SENTENCING

A. Campbell

Campbell asserts two claims of error

with respect to the sentence she received: First, the court erred by ordering restitution of $500,000 because she only defrauded the credit union of $101,000 and, in any event, the court failed to consider whether she has the means to pay such a huge indemnity; and, second, she should not have been sentenced consecutively (to concurrent counts 24 and 25) on count 26 because the latter count did not require any proof in addition to what had already been given on the other two counts.

Taking Campbell's second argument first, we note that her conviction on count 26 (aiding and abetting false entries in books and records in violation of 18 U.S.C. s 1006) differs in its elements and proof from her conviction on counts 24 and 25 (credit union fraud in violation of 18 U.S.C. s 1344). Accordingly, consecutive sentencing was not improper. See United States v. Laurins, 857 F.2d 529, 542 (9th

Cir.1988) (citing Blockburger v. United States, 284 U.S. 299, 304 (1932)), cert. denied, 492 U.S. 906 (1989).

With respect to the first part of her restitution claim, she was properly charged with and convicted of two separate counts involving criminal wrongdoing that resulted in a nearly $1 million loss to the credit union and the NCUA (count 24, $1 million loan commitment to cover $850,000 letters of credit; count 25, $101,000 advance on that loan commitment; none of which she repaid). There was no error on this point, either. See United States v. Scarano, No. 91-10143, slip op. 13683, 13686 (9th Cir. Nov. 24, 1992) (order amending opinion reported at 975 F.2d 580, 585).

However, the second part of Campbell's restitution argument has merit. efectively conceded at oral argument, that the district court not only failed to make the necessary findings to support the ordered

$500,000 restitution, but that the amount of restitution required should not exceed the $101,000 Campbell actually received from the credit union. Under these circumstances, the restitution portion of Campbell's sentence must be vacated and remanded for further proceedings. See United States v. Jackson, 982 F.2d 1279, 1284 (9th Cir. 1992) (restitution order cannot go beyond offense of conviction).

B. Serrano and Wilson

Serrano contends, apparently for the first time on appeal, that the district court erred by ordering that he pay restitution of $422,000 because, put simply, his share of any wrongdoing results in numbers that just don't add up to that sum, e.g., his portion of the restitution on the $183,000 loan should be at least partially offset by the value of the Colonial Park lots, allegedly still held as collateral by the NCUA.

"Objections to restitution that are not raised in the district court are usually deemed waived." United States v. Clack, 957 F.2d 659, 661 (9th Cir.1992). However, this court will consider the issue if review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process; a change in law raises a new issue while an appeal is pending; or the issue is purely one of law. Id. In Clack, the defendant was convicted of violating the Hobbs Act and possession of stolen property. We vacated part of the sentence and remanded, holding that the district court erred in ordering restitution without determining the value of recovered property and deducting it from the total award. Id.

Our examination of the record leaves us in some doubt as to whether this information, at least, was properly taken into consideration at Serrano's and

Wilson's respective sentencings. Accordingly, those portions of Serrano's and Wilson's sentencings involving the restitution orders must be remanded for clarification or resentencing.

CONCLUSION

Because we find no merit to any of the appellants' remaining arguments, the judgments of conviction are all AFFIRMED. The sentences imposed are REMANDED for proceedings consistent with the above.

APPENDIX B
ORDER DENYING REHEARING

NOT FOR PUBLICATION
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SHARYN G. CAMPBELL, Defendant-Appellant.	No. 92-30024 D.C. #CR-91-34-3-RWL
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. GILBERT R. SERRANO, Defendant-Appellant.	No. 92-30033 D.C.# CR-91-034-RWL
UNITED STATES OF AMERICA Plaintiff-Appellee, v. EMMITT L. WILSON, Defendant-Appellant.	No. 92-30037 D.C. # CR-91-34-1-RSWL ORDER

Before: WALLACE, Chief Judge, WRIGHT, and LEAVY, Circuit Judges.

The panel has voted to deny Serrano's

petition for rehearing. hief Judge Wallace and Judge Leavy have voted to reject the suggestion for rehearing en banc, and Judge Wright has so recommended.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

(2)

Supreme Court, U.S.
FILED
SEP 16 1993
OFFICE OF THE CLERK

Nos. 93-109 and 93-5403

In the Supreme Court of the United States

OCTOBER TERM, 1993

GILBERT R. SERRANO, PETITIONER

v.

UNITED STATES OF AMERICA

EMMITT L. WILSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court properly instructed the jury on the meaning of proof beyond a reasonable doubt.

2. Whether the district court properly instructed the jury on the intent required for conviction on the fraud charges against petitioners.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Cage v. *Louisiana*, 498 U.S. 39 (1990)	7, 8
Cheek v. *United States*, 498 U.S. 192 (1991)	11
Estelle v. *McGuire*, 112 S. Ct. 475 (1991)	8
Holland v. *United States*, 348 U.S. 121 (1954)	5, 6, 7
Liparota v. *United States*, 471 U.S. 419 (1985)	11
Sullivan v. *Louisiana*, 113 S. Ct. 2078 (1993)	8
United States v. *Adamson*, 700 F.2d 953 (5th Cir.), cert. denied, 464 U.S. 833 (1983)	10
United States v. *Barrera-Gonzales*, 952 F.2d 1269 (10th Cir. 1992)	7, 8
United States v. *Gibson*, 726 F.2d 869 (1st Cir.), cert. denied, 466 U.S. 960 (1984)	8
United States v. *Hunt*, 794 F.2d 1095 (5th Cir. 1986)	8
United States v. *McAnally*, 666 F.2d 1116 (7th Cir. 1981)	10
United States v. *Taylor*, No. 92-3112 (D.C. Cir. July 20, 1993)	8, 9
United States v. *United States Gypsum Co.*, 438 U.S. 422 (1978)	10, 11

Constitution and statutes:

U.S. Const. Amend. V (Due Process Clause)	6, 7
7 U.S.C. 2024(b)(1)	11
18 U.S.C. 371	2
18 U.S.C. 657	2

Statutes—Continued: Page

18 U.S.C. 1006 2
18 U.S.C. 1014 2
18 U.S.C. 1344 2

Miscellaneous:

Federal Judicial Center, *Pattern Criminal Jury Instructions* (1982) 8

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-109

GILBERT R. SERRANO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 93-5403

EMMITT L. WILSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A19)[1] is not reported, but the judgment is noted at 985 F.2d 575 (Table).

JURISDICTION

The judgment of the court of appeals was entered on January 27, 1993. A petition for rehearing was denied on April 27, 1993. Pet. App. B1-B2. The petition for a

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[1] "Pet. App." refers to the appendix to the petition in No. 93-109.

writ of certiorari in No. 93-109 was filed on July 19, 1993. The petition for a writ of certiorari in No. 93-5403 was filed on July 26, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Alaska, petitioners were convicted on numerous counts relating to their fraudulent financial transactions with a federal credit union.[2] Petitioner Serrano was sentenced to five years' imprisonment and was ordered to pay $422,000 in restitution to the National Credit Union Administration (NCUA). Petitioner Wilson was sentenced to ten years' imprisonment and was ordered to pay $850,000 in restitution to the NCUA. The court of appeals affirmed petitioners' convictions.[3] Pet. App. A1-A19.

---

[2] Petitioners were convicted of fraudulently participating or sharing in credit union funds, in violation of 18 U.S.C. 1006; misapplying credit union funds, in violation of 18 U.S.C. 657; overvaluing land or property for the purpose of influencing a credit union, in violation of 18 U.S.C. 1014; making false entries in books or reports of a credit union, in violation of 18 U.S.C. 1006; making false statements in connection with a loan, in violation of 18 U.S.C. 1014; engaging in a fraudulent scheme to obtain funds of a credit union, in violation of 18 U.S.C. 1344; and of conspiring to commit those offenses, in violation of 18 U.S.C. 371. Petitioner Wilson was also convicted of issuing credit union obligations without authorization, in violation of 18 U.S.C. 1006.

[3] The court of appeals stated that it had "some doubt" concerning the district court's calculation of the amount of restitution petitioners were ordered to pay, and it remanded "those portions of [petitioners'] sentencings involving the resti-

1. Petitioner Wilson was the president of the Alaska Teamsters Federal Credit Union, and petitioner Serrano was his partner in a real estate development venture. The evidence at trial showed that petitioners fraudulently obtained loans from the credit union, which they invested in their real estate partnership. Gov't C.A. Br. 3-30.

2. At trial, petitioners asked the district court to instruct the jury on the meaning of proof beyond a reasonable doubt. Petitioners' proposed jury instruction defined "reasonable doubt" as "the kind of doubt that would make a reasonable person hesitate to act" and stated that "[p]roof beyond a reasonable doubt must * * * be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his own affairs." C.A. App. 101. The district court declined to give the requested instruction. Instead, it instructed the jury that

> [a] reasonable doubt is a doubt based upon reason and common sense, and may arise from a careful and impartial consideration of all the evidence, or from lack of evidence. Proof beyond a reasonable doubt is proof that leaves you firmly convinced that the defendant is guilty.
>
> If after a careful and impartial consideration with your fellow jurors of all the evidence, you are not convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant not guilty. On the other hand, if after a

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tution orders" for "clarification or resentencing." Pet. App. A18-A19.

> careful and impartial consideration with your fellow jurors of all the evidence, you are convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant guilty.

C.A. App. 105.

The district court also instructed the jury on the elements of each of the charged offenses. With respect to the offense of credit union fraud, the court instructed the jury as follows:

> In order for a defendant to be found guilty of credit union fraud in violation of § 1344 of Title 18 of the United States Code, the government must prove the following beyond a reasonable doubt:
>
> > *First*, that the defendant knowingly executed or attempted to execute a scheme or artifice to defraud the Alaska Teamsters Federal Credit Union [of money or property] as alleged in the Indictment, or that the defendant knowingly executed or attempted to execute a scheme or artifice to obtain money or property under the custody or control of the Alaska Teamsters Federal Credit Union by means of material false statements or representations;
> >
> > *Second*, the defendant did so with intent to defraud; and
> >
> > *Third*, that the Alaska Teamsters Federal Credit Union was a federally chartered or insured financial institution.
>
> * * * * *

> For the purposes of this statute the terms "scheme" and "artifice" are defined to include any plan, pattern or course of action, including false and fraudulent pretenses and misrepresentations, intended to deceive others in order to obtain something of value such as money from the institution to be deceived.
>
> A statement or representation is "false" or "fraudulent" if it relates to a material fact and is known to be untrue or is made with reckless indifference as to its truth or falsity, and is made or cause[d] to be made with intent to defraud. A statement or representation may also be "false" or "fraudulent" when it constitutes a half truth, or effectively conceals a material fact, with[] intent to defraud. * * *
>
> To act with "intent to defraud" means to act knowingly with a specific intent to deceive someone, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to oneself.

C.A. App. 153-154.

In a separate instruction, the district court informed the jury that "[t]he good faith of a defendant is a complete defense to the charges contained in the Indictment because good faith on the part of a defendant is, simply, inconsistent with intent to defraud" and that "[a]n honest mistake in judgment or an error in management does not rise to the level of intent to defraud." C.A. App. 129.

3. On appeal, petitioners argued, relying on *Holland* v. *United States*, 348 U.S. 121, 140 (1954), that

the district court's jury instruction on the meaning of proof beyond a reasonable doubt was improper because it failed to include the "hesitate to act" language approved in *Holland*. The court of appeals rejected that claim, observing that the reasonable doubt instruction the district court gave was "the standard Ninth Circuit Model Jury Instruction." Pet. App. A13-A14.

Petitioners also challenged the district court's instructions on the state of mind necessary to establish fraud. On that issue, the court of appeals found "no error" in the district court's instruction that false or fraudulent statements included statements made with reckless indifference as to their truth or falsity. Pet. App. A14.

ARGUMENT

1. Petitioners contend (93-109 Pet. 10-18; 93-5403 Pet. 4-11) that the jury instruction on the meaning of proof beyond a reasonable doubt violated due process because it informed the jurors that they must be "firmly convinced" of petitioners' guilt in order to convict them and did not include the "hesitate to act" language that petitioners had requested. The court of appeals correctly rejected that claim.

Contrary to petitioners' argument, neither this Court nor any court of appeals has held that the Due Process Clause requires inclusion of the "hesitate to act" language in a reasonable doubt instruction. In *Holland* v. *United States*, *supra*, on which petitioners rely, the challenged jury instruction defined "reasonable doubt" as "the kind of doubt * * * which you folks in the more serious and important affairs of your own lives might be willing to act upon." 348 U.S. at 140. The Court stated that "this section of the charge

should have been in terms of the kind of doubt that would make a person hesitate to act, * * * rather than the kind on which he would be willing to act," but nevertheless affirmed the defendants' convictions, concluding that "the instruction as given was not of the type that could mislead the jury into finding no reasonable doubt when in fact there was some." *Ibid.* Thus, *Holland* plainly does not hold that omission of the "hesitate to act" language in a reasonable doubt instruction is error. Similarly, although some courts of appeals have expressed a preference for the "hesitate to act" formulation, no court has held that failure to use that language violates the Due Process Clause. See, *e.g.*, *United States* v. *Barrera-Gonzales*, 952 F.2d 1269, 1272 (10th Cir. 1992) (noting that court has "upheld several 'reasonable doubt' instructions which have strayed from the 'hesitate to act' formula").

Petitioners also rely (93-109 Pet. 11; 93-5403 Pet. 5, 6-7) on *Cage* v. *Louisiana*, 498 U.S. 39 (1990) (per curiam), but that decision does not support their claim. In *Cage*, this Court sustained a due process challenge to a jury instruction stating that "reasonable doubt" means "such doubt as would give rise to a grave uncertainty" and "an actual substantial doubt" precluding "a moral certainty" of guilt. *Id.* at 40 (internal quotation marks and emphases omitted). The Court found it "plain" that "the words 'substantial' and 'grave,' as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard." *Id.* at 41. Such a suggestion was reinforced, the Court explained, by "the reference to

'moral certainty,' rather than evidentiary certainty."[4] *Ibid.*

The reasonable doubt instruction given at petitioners' trial did not contain any of the wording condemned in *Cage*. Courts have recognized that, unlike the jury instruction at issue in *Cage*, an instruction such as the one given at petitioners' trial, which informs the jurors that they must be "firmly convinced" of the defendant's guilt in order to convict him, does not lower the government's burden of proof. See *United States* v. *Taylor*, No. 92-3112 (D.C. Cir. July 20, 1993), slip op. 11 (jury instruction using "firmly convinced" language does not "suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard"); see also *United States* v. *Barrera-Gonzales*, 952 F.2d at 1273; *United States* v. *Hunt*, 794 F.2d 1095, 1100-1101 (5th Cir. 1986); *United States* v. *Gibson*, 726 F.2d 869, 874 (1st Cir.), cert. denied, 466 U.S. 960 (1984). Cf. Federal Judicial Center, *Pattern Criminal Jury Instructions* 28 (1982) (Instruction 21) (defining "[p]roof beyond a reasonable doubt" as "proof that leaves you firmly convinced of the defendant's guilt"). Thus, there was no reasonable likelihood that the jury that convicted petitioners applied the reasonable doubt instruction in a manner that violated due process. See *Estelle* v. *McGuire*, 112 S. Ct. 475, 482 (1991).

Petitioners' claim (93-109 Pet. 12-15; 93-5403 Pet. 5, 9-10) that the decision below conflicts with decisions

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[4] In *Sullivan* v. *Louisiana*, 113 S. Ct. 2078 (1993), which involved a reasonable doubt instruction that was "essentially identical to the one held unconstitutional" in *Cage*, the Court held that a constitutionally deficient reasonable doubt instruction could not be harmless error. 113 S. Ct. at 2080, 2082-2083.

of other circuits is incorrect. Although petitioners cite cases that have rejected other formulations of the reasonable doubt standard, they do not point to any decision holding that use of the "firmly convinced" language in a reasonable doubt instruction violates due process. See *United States* v. *Taylor*, *supra*, slip op. 11 (noting that no circuit has found a reasonable doubt instruction modeled on the Federal Judicial Center's pattern instruction to be reversible error). Accordingly, this case presents no conflict among the circuits that warrants review by this Court.

2. Petitioner Serrano also challenges (93-109 Pet. 19-26) the jury instruction defining the elements of credit union fraud.[5] He claims that by equating knowledge that a statement is false with "reckless indifference as to its truth or falsity," the district court permitted the jury to convict him based merely on evidence of recklessness, without requiring proof of fraudulent intent.

Petitioner's contention is incorrect. The district court's instructions clearly advised the jury that "false" or "fraudulent" statements, in addition to being knowingly false or made with reckless disregard as to their truth or falsity, must also be "made or cause[d] to be made with intent to defraud." Thus, the court informed the jurors that in order to convict petitioners, they must find that petitioners acted "with a specific intent to deceive someone." Those instructions eliminated any risk that the jurors

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[5] Petitioner Wilson does not argue this point separately, but adopts the arguments made by petitioner Serrano. See 93-5403 Pet. 11.

would believe they could find petitioners guilty without proof of intent to defraud.[6]

Petitioner misplaces reliance (93-109 Pet. 23-25) on *United States* v. *Adamson*, 700 F.2d 953 (5th Cir.) (en banc), cert. denied, 464 U.S. 833 (1983), and *United States* v. *McAnally*, 666 F.2d 1116 (7th Cir. 1981). In each of those cases, the district court instructed the jury that proof of the defendant's "reckless disregard" of the interest of the defrauded bank was sufficient to establish the requisite intent to defraud. See 700 F.2d at 965-966; 666 F.2d at 1118. In this case, in contrast, the district court instructed the jury that it could find that statements were "false" or "fraudulent" if they were made with reckless disregard of their truth or falsity *and* were made with intent to defraud. C.A. App. 154.[7]

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[6] Petitioner Serrano's argument (93-109 Pet. 25) that the jury could have convicted him merely for innocently trusting petitioner Wilson to obtain loans from the credit union is unavailing in light of the district court's instruction to the jury that "good faith on the part of a defendant is * * * inconsistent with intent to defraud" and that "[a]n honest mistake in judgment or an error in management does not rise to the level of intent to defraud." C.A. App. 129.

[7] The decisions of this Court on which petitioner relies (93-109 Pet. 22-23) are even less helpful to him. Each of those cases involved a prosecution under a statute not at issue here, and none of them involved a jury instruction remotely like the one given in this case. In *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978), in which the defendants were charged with engaging in a price-fixing conspiracy in violation of the federal antitrust laws, the Court held that "a defendant's state of mind or intent is an element of a criminal antitrust offense which must be established by evidence and inferences drawn therefrom." *Id.* at 435. Accordingly, the Court concluded that the district court erred in instructing the jury that if the effect

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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of the defendants' exchange of pricing information was to raise or maintain prices, the defendants were "presumed, as a matter of law, to have intended that result." *Id.* at 430, 446. In *Liparota* v. *United States*, 471 U.S. 419 (1985), the Court held that the federal food stamp fraud statute, 7 U.S.C. 2024(b)(1), which makes it unlawful to "knowingly" acquire or possess food stamps "in any manner not authorized by [the statute] or the regulations," requires the government to prove that the defendant knew that his acquisition or possession of food stamps was in a manner unauthorized by the statute or regulations, and that the district court erred in failing to instruct the jury regarding that requirement. 471 U.S. at 433. Finally, in *Cheek* v. *United States*, 498 U.S. 192 (1991), the Court held that in a criminal tax prosecution the district court erred in instructing the jury that a defendant's good faith misunderstanding of the law negates the statutory willfulness requirement only if the misunderstanding is objectively reasonable. *Id.* at 201. In this case, the district court's good faith instruction informed the jury without limitation that "[t]he good faith of a defendant is a complete defense to the charges contained in the Indictment." C.A. App. 129.

Supreme Court, U.S.
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NO. 93-109

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

GILBERT R. SERRANO
Petitioner

V.

UNITED STATES OF AMERICA
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED IN REPLY

Does the Ninth Circuit pattern jury instruction, which defines reasonable doubt as "firmly convinced," dilute reasonable doubt to a mere civil standard and conflict with the instructions used in the Eighth, Eleventh, Second, and Third Circuits, which require the "hesitate to act" definition of *Holland*, and with *Cage v. Louisiana* and *Sullivan v. Louisiana*, which condemn similar definitions?"

TABLE OF CONTENTS

ISSUE PRESENTED IN REPLY i

TABLE OF CONTENTS ii

TABLES OF AUTHORITIES iii

1. "FIRMLY CONVINCED" IS A CIVIL STANDARD THAT CONFLICTS WITH *HOLLAND, CAGE* AND *SULLIVAN* 1

2. THE NINTH CIRCUIT DEFINITION OF REASONABLE DOUBT CONFLICTS WITH OTHER CIRCUITS 4

3. CONCLUSION 8

TABLE OF AUTHORITIES

Addington v. Texas, 441 U.S. 418, 99 S. Ct 1804, 60 L.Ed 2d 323 (1979). . 1

Cage v. Louisiana, 489 U.S. 39,111 S.Ct. 328, 112 L.Ed 2d 339 (1990) . . . 2

Fred Walker Agency v. Lucas, 211 S.E.2d 88 (Va.1975) 1

Holland v. U.S., 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed 150 (1954) 1

Sullivan v. Louisiana, __ U.S.__ (#92-5129, 6/1/93, 1993) 2

U.S. v. Jensen, 561 F.2d 1297 (8th Cir. 1977) 4

United States v Barrera-Gonzales 952 F. 2d 1269 (10th Cir. 1992) 6

United States v. Daniels, 986 F.2d 451 (11th Cir. 1993) 5

United States v. Delibac, 925 F.2d 610 (2d Cir. 1991) 5

United States v. Gibson, 726 F. 2d 869 (1st Cir. 1984) 7

United States v. Hunt, 794 F. 2d 1095 (5th Cir. 1986) 7

United States v. Mcbride, 786 F.2d 45 (2d Cir.1986) 5

United States v. Porter, 821 F. 2d 968 (4th Cir. 1987) 6

United States v. Restaino, 369 F.2d 544 (3rd. Cir.1975) 6

United States v. Taylor, 997 F. 2d 1551 (D.C.Cir. 1993). 7

United States v, Wright, 365 F,2d 1297 (7th Cir. 1966). 6

1. "FIRMLY CONVINCED" IS A CIVIL STANDARD THAT CONFLICTS WITH *HOLLAND, CAGE* AND *SULLIVAN*.

The government argues that this Court has never required a "hesitate to act" definition or condemned a "firmly convinced" definition of reasonable doubt. However, this Court has held that the term "convincing" is a mere civil standard and recently has condemned language almost identical to "firmly convinced."

In *Addington v. Texas*, 441 U.S. 418, 423-24, 99 S. Ct 1804, 1808, 60 L.Ed 2d 323 (1979), this Court held that the civil standard of "clear and convincing evidence" includes evidence which is "cogent" "unequivocal" or "*convincing*." The civil clear and convincing standard is defined as "a firm belief or conviction." *Fred Walker Agency v. Lucas,* 211 S.E.2d 88, 92 (Va.1975) The "firmly convinced" standard is thus identical to this *civil* standard.

In *Holland v. U.S.*, 348 U.S. 121, 75

S.Ct. 127, 99 L.Ed 150 (1954), this Court condemned the term "serious affairs" since reasonable doubt involves more certainty than "buying a house or choosing a spouse." Yet anybody who buys a house or proposes marriage is normally "firmly convinced." The firmly convinced standard is no higher than the "serious affairs" standard condemned in *Holland*.

In *Cage v. Louisiana*, 489 U.S. 39, 111 S.Ct. 328, 112 L.Ed 2d 339 (1990) and *Sullivan v. Louisiana*, __ U.S.__ (#92-5129, 6/1/93), this Court condemned defining reasonable doubt as "substantial" or "grave." The term "firmly convinced" is no different than the terms "substantial" and "grave" condemned in *Cage* and *Sullivan*./[1]

Nor does the government state how "firmly" rises above a mere preponderance.

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1 The government also fails to distinguish the many cases that have condemned similar terms like "abiding conviction," "well founded," "substantial," "strong," "serious," or "fair doubt." *See* Opening Petition pages 13-15.

Jurors could easily believe "firmly" means believing guilt is "more likely than not," to a degree of only 51%, and does not require jurors to extinguish significant doubts. One might be "firmly convinced" to vote for a presidential candidate despite serious hesitations as to all. One might be firmly convinced to buy a Chevy instead of a Ford but have major doubts as to both. Surveys show jurors estimate a reasonable doubt to be as low as 50%. /[2]

No person should suffer jail or the death penalty based on a civil standard of reasonable doubt. "Firmly convinced" is exactly the type of definition found to be a civil standard in *Addington* and condemned in *Holland, Cage and Sullivan* and offends the very essence of due process.

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2 McCauliff, *Burdens of Proof Degrees of Belief, Quanta of Evidence or Constitutional Guaranties?* 35 Vanderbuilt L. Rev. 1293, 1325 (1982(Tab.2); *See also* David Strawn & Raymond Buchanan, *Jury Confusion: A Threat to Justice*, 59 Judicature 478, 481-82 (May 1976).

2. THE NINTH CIRCUIT DEFINITION OF REASONABLE DOUBT CONFLICTS WITH OTHER CIRCUITS.

The government argues there is no conflict in the circuits. This is false. The Eighth, Second, and Eleventh Circuits all require the "hesitate to act" instruction of *Holland*. The Second, Fourth, and Tenth Circuits have criticized use of the "firmly convinced" standard.

The Eighth Circuit adopted the "hesitate to act" definition in *U.S. v. Jensen*, 561 F.2d 1297 (8th Cir. 1977) and held that defining reasonable doubt in terms of an "abiding conviction" improperly diluted reasonable doubt to a preponderance standard, contrary to *Holland, supra;*

> The instruction is confusing because it makes reasonable doubt contingent upon whether one is "satisfied of the defendant's guilt" and whether one has "an abiding conviction of guilt." *Use of these phrases approaches a reasonable man criterion rather than the strict standard envisioned as "beyond a reasonable doubt."*

Id. at 1301. (emphasis added) The term "abiding conviction" condemned by the Eighth Circuit is indistinguishable from the "firmly convinced" standard.

The Second Circuit in *United States v. Mcbride,* 786 F.2d 45, 51 (2d Cir. 1986), cautioned against a "firmly convinced" standard noting this would confuse juries and stated its preference for the "hesitate to act" definition. In *United States v. Delibac,* 925 F.2d 610 (2d Cir. 1991), the Second Circuit more recently repeated it's earlier warning that the "hesitate to act" language of *Holland,* must be included in reasonable doubt definitions. *Id.* at 614.

The Eleventh Circuit recently re-affirmed its "hesitate to act" pattern instruction in *United States v. Daniels,* 986 F.2d 451 (11th Cir. 1993) stating its disapproval of a "substantial doubt" standard and preference for the "hesitate to act" standard. *Id.* at 456-458.

The Fourth Circuit holds that no definition need be given unless requested by the jury, but recently condemned "firmly convinced" stating its preference for the "hesitate to act" definition if one is given. *United States v. Porter*, 821 F.2d 968 (4th Cir. 1987), *cert. denied*, 485 U.S. 934, 108 S.Ct. 1108 (1988).

Contrary to the government's contention, the Tenth Circuit has not adopted a "firmly convinced" standard. In *United States v Barrera-Gonzales*, 952 F.2d 1269 (10th Cir. 1992) (cited by the government) the Tenth Circuit recently found "firmly convinced" was not "plain error" in absence of objection, but re-affirmed its strong preference for the "hesitate to act" definition of *Holland*.

The Third Circuit also urges use of the "hesitate to act" definition. *United States v. Restaino*, 369 F.2d 544 (3rd. Cir. 1975).

By contrast, the government argues that the D.C., First, Fifth, and Ninth Circuits have upheld "firmly convinced" instructions./[3] The government's cases illustrate that there is a serious and growing split in the circuits on this vital instruction./[4]

Thus, contrary to the government's argument, the Eighth, Second, Third, and Eleventh Circuits require the "hesitate to

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3 The government cites *United States v. Taylor*, 997 F. 2d 1551 (D.C.Cir. 1993); *United States v. Gibson*, 726 F. 2d 869 (1st Cir. 1984), *cert denied*, 466 U.S. 934, 108 S.Ct. 2174, 80 L.Ed 2d 557 (1984); *United States v. Hunt*, 794 F. 2d 1095 (5th Cir. 1986).

4 The D.C. and Tenth Circuit instructions in *United States v. Taylor, supra*, and *United States Barrera-Gonzales, supra*, unlike the Ninth Circuit pattern state that "firmly convinced" requires more than a preponderance, as follows;

> Some of you have served as jurors in civil cases where you were told it was only necessary to prove a fact is more likely true than not true. We call that the preponderance of the evidence. In criminal cases the government's proof must be more powerful than that; it must be beyond a reasonable doubt.

By contrast, the Ninth Circuit pattern given never explained that "firmly" means more than a preponderance.

act" definition of *Holland*. The Second and Fourth Circuits, have criticized "firmly convinced," and the Tenth and Third Circuits have stated their preference for the "hesitate to act" standard. These Circuits are in conflict with the D.C., First, Fifth, and Ninth Circuit's "firmly convinced" standard.

It is astonishing to think that something as vital as the definition of reasonable doubt can vary from Circuit to Circuit. Federal due process should be the same in Alaska as it is in New York. It cannot be said there is "equal justice for all" when in some Circuits defendants are given a "hesitate to act" standard of reasonable doubt, while in other circuits defendants are given a diluted civil standard such as "firmly convinced" or no definition at all.

3. CONCLUSION

The Ninth Circuit's pattern definition of reasonable doubt as "firmly convinced," is a mere civil standard, under *Addington* and is contrary to *Holland, Cage and Sullivan,* which condemn virtually identical terms such as "serious affairs," "substantial" and "grave."

The "firmly convinced" standard conflicts with the Eighth, Second, Third, and Eleventh Circuits, which require the "hesitate to act" definition of *Holland,* and the Fourth and Tenth Circuits, which have criticized a "firmly convinced" standard.

No person should suffer jail or the death penalty based on a civil standard of reasonable doubt. Nor is there equal justice for all so long as those in some circuits are given a "hesitate to act" standard of reasonable doubt, while those in conflicting circuits get a mere civil

standard of "firmly convinced."

This Court should grant this writ or summarily reverse the Ninth Circuit's use of a pattern instruction that so violently conflicts with *Holland, Cage, and Sullivan*.

Respectfully submitted this 27th day of September, 1993.

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